Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

EDWARD and FRANCIS MULCAHY,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, MARINE DIVISION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Washington

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. GEISNESS
Counsel of Record
THE GEISNESS LAW FIRM
The Hoge Building, Suite 801
705 Second Avenue
Seattle, WA 98104
(206) 728-8866

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Congress has not adopted a worker's compensation statute applicable to seamen.[1] To compensate seamen for personal injuries and death, the federal courts and Congress have developed two remedies: the doctrine of unseaworthiness and Jones Act negligence.

The primary duty doctrine, a judicially created defense applied by some courts, absolutely precludes an injured seaman from recovering damages under either remedy. This Court has never addressed the viability and requirements of the primary duty doctrine. The two interrelated questions presented in this case are:

1. Under what circumstances, if any, may a trier of fact find the primary duty doctrine applicable as a complete bar to a seaman's recovery for personal injuries suffered in the course of his employment?

2. Does improperly charging a jury with the primary duty doctrine warrant a new trial upon a defense verdict?

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[1] Generally, a "seaman" is a person who is employed aboard a vessel in navigation and whose duties contribute to the function of the vessel. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-69 (1995).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Washington State Court of Appeals was unreported. (App. 1-6). The Washington Supreme Court's denial of petitioners' Petition for Review has not been published as of this date. (App. 7).

JURISDICTION

The Washington State Court of Appeals affirmed a jury verdict in favor of respondents on July 16, 2001. The Washington State Supreme Court denied petitioners' Petition for Review of that decision on January 8, 2002. This Court has jurisdiction under 28 U.S.C. §1257 as this matter involves questions concerning petitioner's rights under substantive federal maritime law and the Jones Act (46 U.S.C. Appx. §688).

STATEMENT OF THE CASE

I. THE PROCEEDINGS BELOW

Francis and Edward Mulcahy are seamen employed in the engine rooms of ferry boats operated by the State of Washington Department of Transportation (hereinafter "WSDOT").

In 1994, the Mulcahys discovered that they were suffering from profound hearing loss. As seamen, the Mulcahys brought claims against the State of Washington for maritime personal injury under the Jones Act (46

U.S.C. Appx. §688) and the federal maritime common law doctrine of unseaworthiness.[2]

At trial, the Mulcahys alleged, *inter alia*, that they suffered hearing loss as a result of unseaworthy/Jones Act negligence conditions aboard the vessels; the unsafe noise levels in the ferry boat engine rooms.

At the close of evidence, the trial court charged the jury with an instruction on comparative fault. Over petitioners' objection, the trial court also charged the jury with an instruction on the primary duty doctrine which stated:

> Generally, a seaman employee is barred from recovering damages from his employer for injuries caused by the employee's failure to perform a duty imposed upon him by his employment. In order for plaintiffs' claims to be barred in this case, the defendant must prove each of the following by a preponderance of this evidence:
>
> 1. Plaintiffs consciously assumed a specific duty as a condition of their employment;
>
> 2. Plaintiffs knowingly failed to perform the consciously assumed duty;
>
> 3. Any injuries sustained by plaintiffs were caused by plaintiffs' failure to perform the consciously assumed duty; and
>
> 4. Plaintiffs were not injured by a dangerous condition which they could not have

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[2] This case was brought in Washington State Superior Court, rather than Federal District Court as the Eleventh Amendment bars a federal court suit against a state. *Edelman v. Jordan*, 415 U.S. 651 (1974).

> controlled or eliminated in the proper exercise of their consciously assumed employment duties.
>
> **If you find by a preponderance of the evidence that each of these propositions has been proven, then plaintiffs' claims are barred and you should find for the defendants.** On the other hand, if you find that any one of these propositions has not been proven, then you must decide plaintiffs' claims in accordance with the court's other instructions.

(App. 3) (emphasis added).

With this instruction, the jury, by special verdict, found that WSDOT was not negligent and that its vessels were seaworthy. This verdict was affirmed on appeal. In doing so, the Court of Appeals refused to address whether the instruction was proper and/or supported by the evidence, reasoning that the instruction "had no effect on the outcome of the trial." (App. 6). The Washington State Supreme Court denied review. (App. 7).

II. THE APPLICABLE FEDERAL MARITIME LAW

This Court has long recognized that our federal system requires uniformity in substantive maritime law. State courts are required to apply federal maritime law in matters affecting maritime commerce. *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205 (1917).

A. A SEAMAN'S REMEDIES FOR PERSONAL INJURY

The Mulcahys, as seamen, are wards of this Court. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

As seamen, the Mulcahys are barred from receiving benefits under any state or federal Worker's Compensation scheme. A seaman's sole remedy for personal injury is through suit under the doctrine of unseaworthiness and/or the Jones Act. *Atlantic & Gulf v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962).

B. THE DOCTRINE OF UNSEAWORTHINESS

Under the doctrine of unseaworthiness, a "shipowner has an absolute duty to furnish a seaworthy ship. A seaworthy ship is one reasonably fit for its intended use." *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Failure to provide a seaworthy ship results in strict liability for personal injury proximately caused by that unseaworthiness.

C. THE JONES ACT

The Jones Act permits seamen who suffer personal injury to maintain an action at law for damages. 46 U.S.C. Appx. §688. In order to recover, the seaman has the burden to demonstrate that his employer or co-workers were "negligent and that this negligence was a cause, however slight, of his injuries." *Ribitzki v. Canmar Reading & Bates*, 111 F.3d 658, 662 (9th Cir. 1997).

D. COMPARATIVE FAULT IS THE RULE

Damage awards in unseaworthiness and Jones Act cases are reduced in proportion to the negligence of the seaman. Contributory negligence and assumption of the risk are not a bar to recovery. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431-33 (1939).

E. THE PRIMARY DUTY DOCTRINE

Under the primary duty doctrine, as adopted by some courts, a seaman's own comparative fault may bar recovery. The primary duty doctrine provides that a seaman "may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment." *Bernard v. Maersk Lines*, 22 F.3d 903, 906 (9th Cir. 1994).

The doctrine is in conflict with the admiralty principles that contributory negligence and assumption of the risk do not bar a seaman's recovery. Under the primary duty doctrine, a seaman's own negligence in performing his duties can bar recovery.

REASONS FOR GRANTING THIS PETITION

The viability and application of the primary duty doctrine have never been addressed by this court and that lack of guidance has left the various circuits divided over if, when and how to apply the doctrine.

I. PRIMARY DUTY OR COMPARATIVE FAULT

The primary duty doctrine traces its origins to the Second Circuit and *Walker v. Lykes Bros. S.S. Co.*, 193 F.2d 772 (2nd Cir. 1952). In *Walker*, the court held that an officer's negligent failure to ensure that a defective piece of equipment was repaired could bar the officer's recovery when that defective equipment injured him.

Walker was explained in *Dixon v. United States*, 219 F.2d 10, 16 (2nd Cir. 1955). The *Dixon* court refused to apply *Walker* as written reasoning that *Walker* stands for the proposition that a seaman should be barred from recovery only when his negligence is the sole cause of his injury – an issue of comparative fault.

Walker and *Dixon* illustrate the difficulty with the primary duty doctrine; the doctrine directly conflicts with principles of comparative fault. Under *Walker*, when the primary duty doctrine is raised as a defense, the trier of fact is required to make a determination of whether a seaman's negligent act or omission was a violation of some specific duty (barring recovery under the primary duty doctrine) or a violation of general duty to use reasonable care (reducing recovery under principles of comparative fault).

Recognizing this problem, the second circuit rejected *Walker* and has followed *Dixon*. In *Dunbar v. Henry Du Bois' Sons Co., Inc.*, the court flatly refused to follow the primary duty doctrine as set out in *Walker*:

> Judge Clark and I believe that the [primary duty doctrine] is incompatible with the congressional mandate that contributory negligence and

> assumption of risk shall not bar recovery in a Jones Act case.

275 F.2d 304, 306 (2nd Cir.), *cert. denied*, 364 U.S. 815 (1960).

The First, Fifth and Seventh Circuits have followed, holding that a seaman's negligence in carrying out his duties is an issue of comparative fault. Those circuits hold that the trier of fact should not be allowed to consider both a primary duty defense and comparative fault. Rather, the trier of fact should be instructed only on comparative fault and left free to determine the relative fault of the parties. Consistent with principles of comparative fault, if the seaman is found 100% at fault for his injuries, he is barred from recovery.

> The primary duty rule provides that a ship's officer may not recover against his employer for negligence or unseaworthiness when there is no other cause of the officer's injuries other than the officer's breach of his consciously assumed duty to maintain safe conditions aboard the vessel. . . . The primary duty rule does not bar recovery where the plaintiff breached his duty but the ship's owner was also independently at fault. . . . The primary duty rule bars recovery only if there was no cause of the officer's injuries other than the breach of duty.

Wilson v. Mar. Overseas Corp., 150 F.3d 1, 13-14 (1st Cir. 1998).

> [E]ven if an employee's injury resulted in part from his own negligence, whether in failing to carry out his duties or in some other respect, such negligence would only reduce, not bar,

> recovery unless the employer were not negligent at all and the employee's negligence was the sole cause of injury.

Kendrick v. Illinois Cent. Gulf R.R. Co., 669 F.2d 341 (5th Cir. 1982) (FELA case).

> The inquiry at trial should endeavor to apportion responsibility for the injury. . . . If [negligence of the seaman] is the sole cause of injury, the employer's non-negligence bars recovery.

Kelley v. Sun Transp. Co., 900 F.2d 1027, 1031 (7th Cir. 1990).

Similarly, the Sixth Circuit looks solely to comparative fault and bars recovery only when there is a showing that the injury causing condition was solely the result of the seaman's failure to carry out his assigned duties. *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178 (6th Cir. 1990).

Those circuits that do recognize the primary duty doctrine as raising a defense separate and apart from comparative fault have developed confusing tests for application of the doctrine.

The Ninth Circuit, the only circuit to delineate a test for application of the primary duty doctrine, has set a vague and confusing three-part test for its application:

> First, the "primary duty" rule will not bar a claim of injury arising from the breach of a duty that the plaintiff did not consciously assume as a term of his employment. Second, the rule does not apply where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated. Third, the rule applies only to a knowing violation of a

> duty consciously assumed as a term of employment.

Bernard v. Maersk Lines, 22 F.3d 903, 907 (9th Cir. 1994).

The Fourth and Eleventh Circuits have never explicitly defined the circumstances under which the primary duty doctrine should be considered by the trier of fact, but have limited the doctrine's application to officers charged with the duty of maintaining the ship. *Villers Seafood Co. v. Vest*, 813 F.2d 339, 342 (11th Cir. 1987); *Dempsey v. Mack Towing, Inc.*, 876 F.2d 1538, 1542, n.2 (11th Cir. 1989); *Mason v. Lynch Bros.*, 228 F.2d 709, 712 (4th Cir. 1956).

II. THE WIDESPREAD IMPACT OF THE PRIMARY DUTY DOCTRINE

For the twelve month period ending September 30, 2001, 2,164 maritime personal injury cases were filed in federal district court.[3] This does not include those cases filed in state courts and those cases settled before suit was filed.

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[3] *See* U.S. District Courts – Civil Cases Commenced by Nature of Suit, During the Twelve-Month Period Ending September 20, 1997 through 2001. (Available at http://www.uscourts. gov/caseload2001/tables/c03mar01.pdf).

III. THIS COURT SHOULD ACCEPT REVIEW IN ORDER TO RESTORE UNIFORMITY TO FEDERAL MARITIME LAW. THE DIVIDED CIRCUITS' DIFFERING APPLICATIONS OF THE PRIMARY DUTY DOCTRINE HAS LED TO UNFAIR RESULTS AND UNFAIRLY INCREASES THE SEAMAN'S BURDEN.

The primary duty doctrine, when applied, operates as a complete bar to a seaman's recovery for personal injury suffered in the course of his employment.

Suits under the doctrine of unseaworthiness and the Jones Act are a seaman's only recourse for personal injury. Application of the primary duty doctrine conflicts with the congressional and common law dictates that contributory negligence and assumption of the risk are not bars to recovery in a seaman's personal injury suit.

As the law now stands, a seaman in the Ninth Circuit is held to a different standard of conduct and has a heavier burden when seeking recovery for personal injury then a seaman in other circuits.

> There is no workmen's compensation act for mariners or railroaders. For them, compensation depends on a jury finding of negligence. It is well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed. . . . Indeed, "trial by jury is part of the remedy."

Johannessen v. Gulf Trading & Transp. Co., 633 F.2d 653, 656 (2nd Cir. 1980) (quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962)).

Trial by jury is part of a seaman's remedies. When the trier of fact is instructed to apply the primary duty doctrine along with comparative fault, the seaman's burden at trial becomes duplicitous, difficult and confusing for the trier of fact.

The seaman's burden is duplicitous and difficult and confusing for the trier of fact because the arguments in support of a comparative fault defense are often times those same arguments that support a primary duty defense.

This Court should accept review and determine under what circumstances, if any, a seaman should be required to meet his burden of proof as to unseaworthiness and Jones Act negligence while simultaneously defending himself from charges of comparative fault (reducing damages) and failure to perform a primary duty (barring damages).

CONCLUSION

This Court in protecting seaman's rights should ensure uniformity in the substantive federal maritime law. For the foregoing reasons, this petition for writ of certiorari should be granted.

DATED this 8th day of April, 2002.

THE GEISNESS LAW FIRM

THOMAS M. GEISNESS,
WSBA#1878

Attorney for Petitioners

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED

/s/ Susan R. Agid

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDWARD MULCAHY and FRANCIS MULCAHY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, MARINE DIVISION, Respondents.	No. 45602-4-I DIVISION ONE UNPUBLISHED OPINION FILED: JUL 16 2001

WEBSTER, J. – This is a maritime personal injury case brought under the Jones Act[1] and the federal common law doctrine of unseaworthiness. Both appellants allege that they suffered severe hearing loss as a result of unsafe noise levels in their place of employment, the engine rooms of various Washington State Department of Transportation ("WSDOT") – operated ferry boats. On appeal, they argue that a new trial is warranted because the jury was improperly instructed. Furthermore, they maintain

[1] 46 U.S.C. § 688 *et seq.*

that the ferry boat engine rooms are unseaworthy as a matter of law. We affirm.

FACTS

Edward and Francis Mulcahy are brothers and Chief Engineers on ferries operated by the Washington State Department of Transportation. Ed Mulcahy worked as an oiler until 1983 when he became an assistant engineer. He earned his chief's license in 1988 or 1989 and became a chief engineer in 1992. Francis Mulcahy started working as an assistant engineer in 1977 and became a chief engineer in 1980. Oilers, assistant engineers, and chief engineers are all engine room personnel.

In May, 1994, the Mulcahys discovered they both had hearing loss after a hearing test performed by an audiologist for the ferry system.

At trial, the experts for both parties agreed that noise levels above 85 dB cause hearing loss. The plaintiffs submitted evidence that the noise level in the engine room of every Washington State ferry far exceeds 85 dB. *See* Ex. 26 (showing a range from 99 to 114 dB). The plaintiffs also presented evidence that seventy-five percent of WSDOT engine room employees suffered from noise induced hearing loss.

After the close of testimony, the trial court charged the jury. Over the plaintiffs' objections, the judge charged the jury with instruction No. 17, which was submitted by WSDOT and which embodied the primary duty doctrine:

> Generally, a seaman employee is barred from recovering damages from his employer for injuries caused by the employee's failure to perform a duty imposed upon him by his employment. In order for plaintiffs' claims to be barred in this case, the defendant must prove each of the following by a preponderance of the evidence:
>
> 1. Plaintiffs consciously assumed a specific duty as a term of their employment;
>
> 2. Plaintiffs knowingly failed to perform the consciously assumed duty;
>
> 3. Any injuries sustained by plaintiffs were caused by plaintiffs' failure to perform the specific duty; and
>
> 4. Plaintiffs were not injured by a dangerous condition which they could not have controlled or eliminated in the proper exercise of their employment duties.
>
> If you find by a preponderance of the evidence that each of these propositions has been proved, then plaintiffs' claim[s] are barred and you should find for the defendants. On the other hand, if you should find that any one of these propositions has not been proved, then you must decide plaintiffs' claims in accordance with the court's other instructions.

CP 722-744.

The jury returned a verdict for WSDOT. Plaintiffs moved for judgment as a matter of law and a new trial, which was denied. This appeal followed.

DISCUSSION

Standard of Review

1. JNOV

A trial court's decision to deny a motion for judgment notwithstanding the verdict is subject to *de novo* review.[2] Thus, a trial court's denial of a motion for judgment notwithstanding the verdict "should be reversed only if no evidence or reasonable inference exists which would be sufficient to sustain a verdict for the nonmoving party" on an issue.[3]

2. Jury Instructions

This court reviews the trial court's decision to charge the jury with Instruction Number 17 for abuse of discretion.[4] A trial court does not abuse its discretion if the jury instructions permit each party to argue their theory of the case, are not misleading, and properly inform the trier of fact of the applicable law when read as a whole.[5]

The requirement that the jury instructions properly inform the trier of fact of the applicable law dictates that, while each party to a lawsuit is "entitled to have its theories presented to the jury," those theories can be

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[2] *Bays v. St. Lukes Hospital*, 63 Wn. App. 876, 880, 825 P.2d 319 (1992).

[3] *Id.*

[4] *Herring v. Dept. of Social & Health Services*, 81 Wn. App. 1, 22, 914 P.2d 67 (1996).

[5] *See, e.g., Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994).

presented to the jury only if they "are supported by the evidence."[6] Thus, a trial court errs if it charges the jury with an instruction that is not supported by the evidence.[7] However, that error will require reversal only when prejudice can be shown. Error is prejudicial if it affects or presumptively affects the outcome of the trial.[8]

Unseaworthiness

Under the doctrine of unseaworthiness, a shipowner has an absolute duty to furnish a seaworthy ship. A seaworthy ship is one reasonably fit for its intended use.[9] A shipowner's liability for failure to maintain a seaworthy vessel is a species of strict liability without fault and not limited by concepts of negligence.[10] A shipowner cannot avoid liability for injury to a seaman caused by a defect in the ship on the grounds that the seaman knew of the defect.[11]

The Mulcahys argue that the denial of their motion for JNOV was error because experts for both sides agreed that the noise levels in the engine rooms constituted dangerous conditions. At trial, the Mulcahys presented evidence that the noise levels in the engine rooms exceed 85 dB and the experts for both sides testified that noise levels in excess of 85 dB can cause hearing loss.

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[6] *Hizey v. Carpenter*, 119 Wn.2d 251, 266, 830 P.2d 648 (1992).

[7] *Id.*

[8] *Herring*, 81 Wn. App. at 23.

[9] *Mahnich v. Southern S.S.*, 321 U.S. 96 (1944).

[10] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

[11] *Mahnich*, 321 U.S. at 103.

WSDOT maintains that the noise levels are not alone determinative and that the Mulcahys' exposure to noise is the relevant factor in determining unseaworthiness. WSDOT is correct. Loud noise is not a dangerous condition if employees have adequate hearing protection.[12] The Mulcahys admit that they always wore hearing protection. RP 82-83. The State's expert testified that the hearing protection provided was adequate to prevent hearing loss. RP 222-223. In addition, duration of exposure is a factor. Thus, we cannot say that no evidence or reasonable inference exists which would be sufficient to sustain a verdict for the WSDOT on the issue of unseaworthiness.

Jury Instruction 17

Furthermore, the Mulcahys argue that the primary duty instruction was not supported by the evidence. But even if this was true, Instruction No. 17 was not prejudicial because it had no effect on the outcome of the trial. Because the jury found the vessels seaworthy, the jury did not reach the question of the primary duty doctrine.

We affirm.

/s/ Webster, J.

WE CONCUR

/s/ [Illegible] /s/ Becker, A.C.J.

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[12] *See generally Hicks v. Crowley Maritime*, 538 F.Supp. 285 (S.D. Tex. 1982).

THE SUPREME COURT OF WASHINGTON

EDWARD MULCAHY and FRANCIS MULCAHY, Petitioners, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, MARINE DIVISION, Respondents.	No. 71510-6 **ORDER** C/A NO. 45602-4-I

Department II of the Court considered this matter at its January 8, 2002, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 8th day of January, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE